

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

BKY No. 09-50779

Dennis E. Hecker,

Chapter 7 Bankruptcy

Debtor.

**NOTICE OF HEARING AND MOTION UNDER §365
TO REJECT AN UNEXPIRED LEASE**

TO: Parties specified in Local Rule 9013-3.

1. Randall L. Seaver, the Chapter 7 Trustee herein ("**Trustee**"), moves the Court for the relief requested below and gives notice of hearing.

2. The Court will hold a hearing on this motion at 9:30 a.m. on September 16, 2009, in Courtroom 8 West, before the Honorable Robert J. Kressel, Federal Building, 300 South Fourth Street, Minneapolis, MN 55415, or as soon thereafter as counsel can be heard.

3. Any response to this Motion must be filed and served by delivery no later than September 11, 2009, which is three (3) days before the above date (excluding Saturdays, Sundays and holidays), or be filed and served by mail not later than September 4, 2009, which is seven (7) days before the date set for the hearing (excluding Saturdays, Sundays and holidays) in accordance with Local Rules. **UNLESS A RESPONSE IS TIMELY SERVED AND FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§157 and 1334, Rule 5005 of the Federal Rules of Bankruptcy Procedure (Bankruptcy Rules), and Local Rule 1070-1. This is a core proceeding. The petition commencing this Chapter 7 case was filed on June 4, 2009 (the "**Filing Date**"). The case is now pending in this Court.

5. This motion arises under 11 U.S.C. §365(a) and Bankruptcy Rule 6006. This motion is filed under Bankruptcy Rule 9014 and Local Rules 9013-1 through 3. The Trustee seeks Court approval of the rejection of a residential real estate lease for the property known as 1615 North Ridge Drive, Medina, MN 55391 ("**North Ridge**") between Debtor and Christi M. Rowan.

6. Ms. Rowan purports to occupy the North Ridge property pursuant to a purported lease with a purported \$5,000.00 per month rent obligation. The Trustee is not certain that the lease was executed pre-petition, but if it was, he is rejecting it. Property taxes are estimated to be \$1,739.00 per month. On information provided by the Debtor's attorney, the mortgage payments are at least \$4,400.00 per month. The Trustee does not know if homeowner's insurance is included in the mortgage payment.

7. In addition to the foregoing, the North Ridge property requires insurance and maintenance. A \$5,000.00 per month rent payment does not approximate the carrying cost of the property.

8. North Ridge also contains many assets of the Debtor which may be liquidated by the Trustee.

9. The Trustee may testify at the hearing of this matter.

WHEREFORE, the Trustee respectfully requests the Court enter an order approving rejection of the lease that is the subject of this Motion.

**LEONARD, O'BRIEN,
SPENCER, GALE & SAYRE LTD.**

/e/ Matthew R. Burton

Dated: August 27, 2009

By: _____

Matthew R. Burton #210018
Attorneys for Trustee
100 South Fifth Street, Suite 2500
Minneapolis, MN 55402
(612) 332-1030

VERIFICATION

I, Randall L. Seaver, Trustee for the Bankruptcy Estate of Dennis E. Hecker named in the foregoing Notice of Hearing and Motion, declare under penalty of perjury that the foregoing is true to the best of my knowledge, information and belief.

Executed on August 27, 2009

/e/ Randall L. Seaver

Randall L. Seaver, Trustee

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

BKY No. 09-50779

Dennis E. Hecker,

Chapter 7 Bankruptcy

Debtor.

**MEMORANDUM OF LAW IN SUPPORT OF TRUSTEE'S EXPEDITED MOTION
UNDER §365 TO REJECT EXECUTORY CONTRACTS**

INTRODUCTION

The facts relevant to this Motion are contained in the Verified Notice of Hearing and Motion which is served and filed herewith. In short, the Trustee seeks to reject a lease which is of no benefit to this bankruptcy estate.

ARGUMENT

I. REJECTION OF LEASES

Bankruptcy Code Section 365(a) provides that the Trustee, "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. §365(a). An executory contract [or unexpired lease] is a contract under which performance from each party remains due at the time the bankruptcy petition is filed. See, e.g., *In re Newcomb*, 744 F.2d 621 (8th Cir. 1984).

If the lease was entered pre-petition, then it is subject to Section 365. Therefore, the Trustee may reject the same, subject to the Court's approval. See 11 U.S.C. §365 (a). In determining whether to approve Trustee's decision to reject an executory contract or unexpired lease, courts apply the business judgment test. See, *In re Audra-John Corp.*, 140 B.R. 752, 755 (Bankr. D. Minn. 1992). This test affords "considerable deference to the proponent of the

rejection," as the [Trustee] need only show "that rejecting the contract will benefit the estate." *Id.* It need not show the contract is burdensome. *Id.*, at 755-56. Under the business judgment test, the Court will substitute its business judgment for the [Trustee's] only when rejection is "so unreasonable that it could [only be based] on bad faith or whim." *In re III Enterprises, Inc.*, 163 B.R. 453, 469 (Bankr. E.D. Pa. 1994) (citing *In re Hardie*, 100 B.R. 284, 287 (Bankr. E.D.N.C. 1989)).

For the foregoing reasons, the Trustee respectfully requests that the Court grant his Motion under §365 to reject the unexpired Leases.

CONCLUSION

The Trustee requests that the Court:

1. Allow the Trustee to reject the subject lease; and,
2. Award the Trustee such other relief as is just and equitable.

**LEONARD, O'BRIEN
SPENCER, GALE & SAYRE, LTD.**

/e/ Matthew R. Burton

Dated: August 27, 2009

By _____
Matthew R. Burton, #210018
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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

BKY No. 09-50779

Dennis E. Hecker,

Chapter 7

Debtor.

UNSWORN CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2009, I caused the following documents:

***Notice of Hearing and Motion Under §365 to Reject an Unexpired Lease,
Memorandum of Law in Support of Trustee's Expedited Motion Under §363 to
Reject Executory Contracts and Order (proposed)***

to be filed electronically with the Clerk of Court through ECF, and that ECF will send an e-notice of the electronic filing to the following:

- Patti H Bass ecf@bass-associates.com
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- US Trustee ustpregion12.mn.ecf@usdoj.gov

I further certify that I caused a copy of the foregoing documents to be mailed by first class mail, postage paid, to the following:

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Dated: August 27, 2009

/e/ Stephanie Wood

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(612) 332-1030

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

BKY No. 09-50779

Dennis E. Hecker,

Chapter 7 Bankruptcy

Debtor.

ORDER GRANTING TRUSTEE'S MOTION UNDER §365 TO REJECT LEASE

This case is before the court on the Motion of Randall L. Seaver, Chapter 7 Trustee, to reject a residential lease for 1615 North Ridge Drive, Medina, MN 55391.

Upon the motion and the files,

IT IS HEREBY ORDERED:

1. The Trustee's Motion is hereby granted.
2. The Trustee's rejection of the lease of 1615 North Ridge Drive, Medina, MN 55391 to Christi M. Rowan is hereby approved and the same is deemed rejected as of the date the Trustee's Motion was served or the date the Trustee gave notice of his intention to reject the same, whichever occurred earlier.

BY THE COURT:

Dated: _____

Robert J. Kressel
U.S. Bankruptcy Judge